

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SMITHWICK & BELENDIUK, P.C.

5028 Wisconsin Ave., N.W.

Suite 301

Washington, D.C. 20016

(202) 363-4559

Plaintiff,

FEDERAL COMMUNICATIONS COMMISSION

445 12th Street, S.W.

Room TW-A325

Washington, D.C. 20554

Defendant.

Civil Action

Docket No. _____

**COMPLAINT FOR
INJUNCTIVE RELIEF**

1. Smithwick & Belendiuk, P.C. (“Smithwick & Belendiuk” or “Plaintiff”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. §552, for injunctive and other appropriate relief to enforce its right to prompt disclosure of government agency records. Plaintiff seeks the release of records requested from the Federal Communications Commission (“FCC” or “Defendant”) concerning the FCC’s investigation of Cellco Partnership’s d/b/a Verizon Wireless (“Verizon Wireless”) improper billing of data charges to its mobile telephone customers.

PARTIES

2. Smithwick & Belendiuk is a professional corporation formed under the laws of the District of Columbia. It is a Washington, D.C. based communications law firm, whose attorneys represent clients before the FCC. Smithwick & Belendiuk’s clients include The Diogenes Telecommunications Project (“DTP”), a not-for-profit association. Like its name sake, the Greek philosopher, Diogenes of Sinope, DTP seeks to challenge established practices and

values, in DTP's case, it seeks to shine a light into the dark corners of proceedings before the FCC. DTP currently has pending before the FCC a petition to deny the transfer of licenses from SpectrumCo, LLC and Cox TMI Wireless, LLC to Verizon Wireless. DTP's FOIA request is relevant to the issues raised in DTP's Petition to Deny.

3. Defendant, FCC is a government "agency" within the meaning of 5 U.S.C. § 552(f)(1).

JURISDICTION AND VENUE

4. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

5. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

FACTUAL ALLEGATIONS

6. For several years, customers had been complaining about mysterious \$1.99 data usage charges on their Verizon Wireless phone bills. Verizon Wireless's data charges reached the attention of the nation when on August 14, 2009, the *Cleveland Plain Dealer* published an article about the problems customers were having straightening out a \$1.99 data charge that appeared on their Verizon Wireless bill. While the \$1.99 data charge was only supposed to apply when the customer downloaded Internet data, the *Cleveland Plain Dealer* found that "thousands of customers apparently have been charged \$1.99 per month for Internet "data usage" even though they had not tried to go online. In some cases, customers were charged when their phones were off, the batteries were dead, the phone's Internet access was blocked or even when the phones didn't have the software to go online."

7. *The New York Times* was next to publish a story on the phantom data charge. In his November 12, 2009 column, *The New York Times*' David Pogue reported on what he termed a "bit of greedy nastiness" from Verizon Wireless. According to the article, Verizon Wireless knew about the phony data charges and was actively concealing the facts from its customers.

8. Based on these newspaper stories and consumer complaints, the FCC's Wireless Telecommunications Bureau and the Consumer and Governmental Affairs Bureau on December 4, 2009, included several questions pertaining to the data charge matter in a letter of inquiry dealing primarily with early termination charges. On December 18, 2009, Verizon Wireless responded by claiming that the data charges "apply when a customer launches the Internet browser and then navigates away from the default Mobile Web homepage to sites other than a Verizon Wireless customer care site. . ." This statement contradicts the previously published news stories and customer complaints. Both the FCC's letter and Verizon Wireless's reply are publicly available.

9. Nothing more was heard from Verizon Wireless until it made a public announcement on October 3, 2010 that it planned to issue refunds and credits to fifteen million customers "due to mistaken past data charges." FCC Commissioner Clyburn made the following statement, released on October 4, 2010, in which she called for a full explanation to affected customers:

The fifteen million overcharged consumers, identified by Verizon Wireless, deserve more than refunds. They deserve answers and steps to assure that such errors will not happen again. We cannot and should not let them down.

Michele Ellison, Chief of the Enforcement Bureau, also emphasized the public's right to know in a statement issued after the Verizon Wireless announcement: "But questions remain as to why it

took Verizon two years to reimburse its customers and why greater disclosure and other corrective actions did not come much, much sooner.”

10. On October 28, 2010 the FCC released an order and a consent decree (“Consent Decree”) terminating an investigation that the Enforcement Bureau had conducted during 2010. Verizon Wireless agreed to pay 25 million dollars to the U.S. Treasury as a “voluntary contribution” in return for the Enforcement Bureau’s promise to end the investigation. Aside from describing remedial measures for customers that were wrongly charged and protective measures to prevent such occurrences in the future, neither the Enforcement Bureau nor Verizon Wireless gave any insight into how Verizon Wireless had managed the issue over several years or any explanation for its failure to take corrective action earlier. The public was left in the dark about how these data charges could have been prolonged and eventually harmed at least fifteen million customers. In return for Verizon’s “voluntary contribution,” the Bureau agreed “it will not use the facts developed in the Investigation through the Effective Date, or the existence of this Consent Decree, to institute on its own motion or refer to the Commission, any new proceeding, formal or informal, or to take on its own motion or refer to the Commission, any action against Verizon Wireless concerning the matters that were the subject of the Investigation or with respect to Verizon Wireless’s basic qualifications, including its character qualifications, to be a Commission licensee or hold Commission authorizations.” Simply stated, the Bureau agreed to forgo its statutory responsibility to regulate Verizon in the public interest.

11. The Consent Decree referenced two letters of inquiry sent by the Enforcement Bureau to Verizon Wireless to which the company filed a number of responses and supplementary responses. None of the letters or Verizon Wireless’s responses are available for public inspection.

Plaintiff's FOIA Request

12. On November 9, 2010, the Plaintiff wrote the Enforcement Bureau requesting the Enforcement Bureau's Letters of Inquiry and Verizon Wireless's responses. Specifically, the Plaintiff requested:

13. The Enforcement Bureau's January 14, 2010, First Letter of Inquiry ("LOI") to Verizon Wireless.

14. Verizon Wireless's March 1, 2010, response to the Enforcement Bureau's First LOI along with Verizon Wireless's supplements to its response of March 15, April 9, April 23, and September 10, 2010.

15. The Enforcement Bureau's July 1, 2010, Second LOI to Verizon Wireless.

16. Verizon Wireless's August 2, 2010, response to the Bureau's Second LOI along with Verizon Wireless's supplements to its second response of August 27, September 1, 22, and 30, and October 1, 2010.¹

17. By letter, the Enforcement Bureau gave Verizon Wireless an opportunity to respond to the Plaintiff's FOIA request. In its December 20, 2010, response to the Enforcement Bureau, Verizon Wireless objected to disclosure of most of the material sought in the FOIA Request. Verizon Wireless submitted a heavily redacted version of the materials.

18. In a letter dated January 14, 2011, ("Bureau Decision") the Enforcement Bureau withheld from disclosure in their entirety the Enforcement Bureau's First and Second LOIs, basing its decision on FOIA Exemptions 7(A) and 7(E), 5 U.S.C. §§552 (b)(7)(A),(E) and Sections 0.457(g)(1) and (5) of the FCC's rules. As for the Verizon Wireless responses and

¹ Subsequent to filing its FOIA request, on a telephone call initiated by the Enforcement Bureau Plaintiff agreed to limit its request to the narrative portions of the referenced Verizon Wireless responses.

supplements, the Bureau Decision, relying on FOIA Exemption 4, 5 U.S.C. §552 (b)(4) and Section 0.459 of the FCC's rules, stated:

We reviewed the information in Verizon Wireless's submissions to the Commission, including its December 20, 2010 response to the notification of your FOIA request, and have determined that Verizon Wireless's responses and supplements dated March 1, 2010, March 15, 2010, August 2, 2010, August 27, 2010, September 1, 2010, September 10, 2010, September 30, 2010, and October 1, 2010, totaling 111 pages, are appropriate for release with Verizon Wireless's redactions made, pursuant to the above-named FOIA exemptions.

According to the Bureau Decision, the material disclosed to Plaintiff was nothing more than the redacted version that Verizon Wireless submitted with its objection letter. Of the one hundred and eleven pages disclosed, most of the text has been redacted. What text remains is largely routine technical description or legal argument. Information pertaining to the questions surrounding Verizon Wireless's conduct with respect to the data charges has been excised.

19. Plaintiff filed an Application for Review of the Enforcement Bureau's decision on February 4, 2011. On August 22, 2011, Plaintiff wrote the FCC requesting expeditious resolution of the pending Application for Review.

20. On September 30, 2011, the Chief of the Enforcement Bureau sent a letter stating that the Bureau has reprocessed the FOIA request and is providing the two requested letters of inquiry with redactions. The Bureau redacted all substantive information leaving only boilerplate procedural instructions. The supplemental response did not "reprocess" Verizon Wireless's responses and supplements, which, as pointed out, was prepared by Verizon Wireless and simply passed on by the Bureau without subjecting the heavily redacted document to its own critical review under FOIA exemptions.

21. The Bureau letter further states that in light of this “supplemental response,” the Bureau is terminating “this docket” unless Smithwick & Belendiuk informs the Commission in writing within 10 days that it intends “to continue prosecuting [its] Application for Review.” On October 4, 2011, Plaintiff timely informed the Commission that it should not dismiss the Application for Review and should continue processing the application. Since then, eight months ago, there has been no action or contact from the FCC. Further action or contact with the FCC is not likely to expedite FCC action on the Application for Review and provide relevant information to the public per FOIA requirements.

22. The Commission has not acted and has exceeded the generally applicable twenty-day deadline for the processing of a FOIA request. 5 U.S.C. § 552(a)(6)(A)(ii). Smithwick & Belendiuk has exhausted all applicable administrative remedies with respect to the FCC’s wrongful withholding of the requested records. 5 U.S.C. § 552(a)(6)(C)(i).

CAUSE OF ACTION

Violation of the Freedom of Information Act for Wrongful Withholding of Agency Records

23. Plaintiff repeats and re-alleges the allegations in paragraphs 1 through 22 above, inclusive.

24. Defendant has wrongfully withheld agency records requested by Plaintiff by failing to comply with the statutory time limit for the processing of FOIA requests. 5 U.S.C. §552(a)(6)(A)(i).

25. Plaintiff is entitled to an order requiring the immediate processing and release of the requested documents. 5 U.S.C. § 552(a)(4)(B).

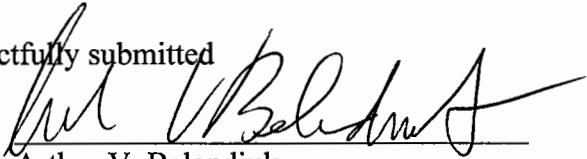
REQUESTED RELIEF

WHEREFORE, Plaintiff prays that this Court:

- A. order Defendant to provide Plaintiff with unredacted copies of the requested records;
- B. provide for expeditious proceedings in this action pursuant to 28 U.S.C. §1657(a);
- C. award Plaintiff its costs and reasonable attorneys fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
- D. grant such other relief as the Court may deem just and proper.

Respectfully submitted

By:



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DATED: June 4, 2012